Supreme Court, U.S.
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No. 91-334

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ZLATKO GVOZDENOVIC, MARGARITA WALINSKI, PATRICIA CARGOULD, and FRANK PEREA, individually and on behalf of that class of 1202 FORMER PAN AM FLIGHT ATTENDANTS and Former Members of The Independent Union of Flight Attendants Now Employed by United Air Lines, Inc.,

Petitioners,

—v.—

UNITED AIR LINES, INC., STEPHEN WOLF, Its President, THE ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO, SUSAN BIANCI-SAND, Its President, PATRICIA FRIEND, Chairperson of the United Air Lines Master Executive Council, and THE UNITED PREACQUISITION FLIGHT ATTENDANTS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS RESTATED

1. Did the court of appeals err in holding that petitioners' claim of violation by United and AFA of RLA § 2, Eleventh, by failing to accord the 1202 Pan Am flight attendants hired February 11, 1986 a 60-day grace period to become financial-core members of AFA, was time-barred.

2. Did the court of appeals err in holding that petitioners' claim of violation by United of RLA § 2, Fourth, by making a payment of $132,700 for its arbitration expenses to each of the two flight attendant groups party to the arbitration proceeding over "competitive seniority" on or about March 7, 1987, was time-barred.

TABLE OF CONTENTS

Page

QUESTIONS RESTATED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 7

I PETITIONERS SHOW NO CONFLICT WITH THE COURT OF APPEALS' HOLDING THAT THE CLAIM OF VIOLATION BY UNITED AND AFA OF RLA § 2, ELEVENTH IS TIME-BARRED 7

II PETITIONERS MAKE NO ARGUMENT FOR REVIEW OF THE COURT OF APPEALS' HOLDING THAT THE CLAIM OF VIOLATION BY UNITED OF RLA § 2, FOURTH IS TIME-BARRED 11

CONCLUSION 11

TABLE OF AUTHORITIES

Cases Page

DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 103 S.Ct. 2281 (1983) 2-3

Felter v. Southern Pacific Co., 359 U.S. 326, 79 S.Ct 847 (1959) 7, 9-10

Local Lodge No. 1424, IAM v. NLRB, 362 U.S. 411, 80 S.Ct. 822 (1960) 10

NLRB v. Campbell Soup Co., 378 F.2d 259 (9th Cir. 1967), cert. den. 389 U.S. 900, 88 S. Ct. 220 (1967) 8

NLRB v. Gottfried Baking Co., 210 F.2d 772 (2d Cir. 1954) 9

NLRB v. Sightseeing Guides and Lecturers Union Local 20076 of Greater N.Y., 310 F.2d 40 (2d Cir. 1962) 9

Statutes

Labor-Management Reporting and Disclosure Act ("LMRDA")

Section 101(a)(3), 29 U.S.C. § 411(a)(3) 2, 5

Railway Labor Act ("RLA")

Section 2, Fourth, 45 U.S.C. § 152, Fourth . . . . . passim

Section 2, Eleventh, 45 U.S.C. § 152, Eleventh . . . . . passim

Other Authorities

Rules of the Supreme Court of the United States, Rule 15.1 6

Federal Rules of Civil Procedure, Rule 23 4

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STATEMENT OF THE CASE

This is an action by four members of a class consisting of the 1202 former Pan Am flight attendants hired as a group by respondent United Air Lines, Inc. ("United")[1/] on February 11, 1986, as part of United's acquisition of Pan Am's Pacific routes on that date, pursuant to a Letter of Agreement dated December 6, 1985 and ratified March 14, 1986 with respondent Association of Flight Attendants, AFL-CIO ("AFA"), the representative of the craft or class of United's flight attendants for purposes of collective bargaining under the Railway Labor Act. The Letter of Agreement granted a package of favorable terms and conditions of employment to the 1202 former Pan Am flight attendants, including exception from the regular 60-day probationary period for becoming regular employees of United; excepted them as well from the regular 60-day grace period to become dues-paying "financial-core" members of AFA; and provided for arbitration of their "competitive seniority" vis-a-vis that of United's 11,000 pre-acquisition flight attendants.

The burden of the action is to vacate the arbitration award rendered September 26, 1987, in the competitive-seniority arbitration proceeding, on the ground, among others, that the award reflected breach by AFA of its duty of fair representation to the 1202 former Pan Am flight attendants. Neither United nor AFA was a party to or otherwise participated in the arbitration proceeding; the two and only parties to the proceeding were the 1202 former Pan Am flight attendants, by a committee of them selected

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1/ United has a parent company, UAL Corporation. It has no non-wholly-owned subsidiaries.

by their former union and funded by a payment of $132,700 by United, on or about March 7, 1986, into their own arbitration bank account, and the 11,000 pre-acquisition United flight attendants, by a committee of them selected by respondent AFA and funded in the same way. The payments were made pursuant to the same United-AFA agreement ratified March 14, 1986.

The action was commenced December 28, 1987, nearly two years later, against AFA and AFA officers only. As commenced that date, it also complained of the February, 1986 failure to accord the 1202 former Pan Am flight attendants a 60-day grace period, but only as an illegal AFA dues increase under Labor Management Reporting and Disclosure Act ("LMRDA") § 101(a)(3), 29 U.S.C. § 411(a)(3). On July 18, 1988, more than a year and a half after commencement of the action, petitioners added a claim that the February 1986 failure to accord a 60-day grace period also constituted a violation by United and AFA of Railway Labor Act ("RLA") § 2, Eleventh, 45 U.S.C. § 152, Eleventh, which permits carriers and labor organizations to make agreements requiring financial-core union membership after the first 60 days of employment, and that the March 1987 payments to the arbitration accounts of the two flight attendant groups party to the arbitration proceeding constituted a violation by United of RLA § 2, Fourth, 45 U.S.C § 152, Fourth, which bars carriers from using their funds to assist or contribute to any labor organization.

The Court of Appeals first, affirming the District Court, upheld the validity of the arbitration award (Pet. A6-10), adding a finding that the claim of AFA breach of duty of fair representation was time-barred under the 6-month statute of limitations recognized in DelCostello v.

Int'l Bhd. of Teamsters, 462 U.S. 151, 169-71, 103 S.Ct. 2281, 2293-94 (1983)(A9). This brief will not further address this portion of the Court of Appeals' decision, understanding as we do that AFA will be filing a brief giving the reasons for denying the writ as to the award-related issues raised or sought to be raised by the petition.

The Court of Appeals next found, affirming the District Court, that the claims of violation of RLA § 2, Eleventh and 2, Fourth were time-barred because:

> The commencement of the suit on December 27, 1987 was more than six months after both the date on which appellants were required to become AFA members, February 11, 1986, and the date on which the Letter of Agreement was ratified, March 14, 1986. Thus, the six-month period in which appellants were required to protest any unlawful denial of a sixty-day grace period or unlawful financial assistance had lapsed. Cf. DelCostello, 462 U.S. at 172; Robinson v. Pan Am. World Airways, Inc., 777 F.2d 84, 87-89 (2d Cir. 1985).

(A10-A11), going on to reject petitioners' argument to the Court of Appeals, not being made in the petition here, that violations "continued" until the time of the award:

> Likewise, appellants' argument that continued hiring of former Pan Am flight attendants and withdrawals by the Pan Am arbitration committee from the finance account up until the time of the arbitration award bring the claims within the six-month statute of

> limitations is meritless. These claims do not allege "continuing" violations because any "vice in the enforcement of this agreement is manifestly not independent of the legality of its execution, as would be the case, for example, with an agreement invalid on its face or with one validly executed, but unlawfully administered." Local Lodge No. 1424, 362 U.S. at 423.

(Pet. A11). In this regard we note, contrary to impressions sought to be conveyed by petitioners in their petition, (1) that the record shows only one post-February 11, 1986 hiring of a former Pan Am flight attendant during the six months preceding petitioners' making of their RLA § 2, Eleventh claim (on July 18, 1988), that of F. Trevino on March 11, 1988 (R. No. 32, p. 2, para. 6), and, in any event, F. Trevino is not a member of the class for which the District Court certified petitioners as the Rule 23 representative, which is the 1202 former Pan Am flight attendants hired February 11, 1986, and (2) that the record does not show any withdrawal by either flight attendant group party to the arbitration proceeding from its United-funded arbitration bank account during the six months preceding petitioners' making of their RLA § 2, Fourth claim (on July 18, 1988). Thus, nothing happened during the six months prior to petitioners' making of their claims of violation of RLA § 2, Eleventh and 2, Fourth, so far as the record shows, which could have triggered the applicable six-month statute of limitations. Further contrary to impressions sought repeatedly to be conveyed by petitioners throughout their petition, which presents a supposed decision by the Court of Appeals on the merits of the claim of violation of RLA § 2 Eleventh as "[t]he most grievous error of the Court of Appeals' decision" (Pet. 6), the Court

of Appeals did not address or decide the claim of violation of RLA § 2, Eleventh (or of § 2, Fourth) on its merits.

Finally, the Court of Appeals, first rejecting the District Court's finding that the claim of violation of LMRDA § 101(a)(3) was time-barred (A11-A12), decided that claim on the merits, against petitioners, in the following paragraph which petitioners erroneously project throughout their petition as a decision on the merits of the claim of violation of RLA § 2, Eleventh:

> However, even though the section 411(a)(3) claims is not time-barred, we hold that it properly was dismissed. Besides the simple fact that appellants have produced little evidence of any illegal dues assessments or increases, the sixty-day grace period of the United-AFA collective bargaining agreement, upon which they base their "unlawful dues increase" claims, applies only to conventional, newly-hired employees, not to individuals hired laterally as a result of a merger. The section provides that "[n]ewly employed flight attendants" must apply for AFA membership within sixty days of commencing employment, and "shall be admitted to membership in the Union upon expiration of their probationary period as defined in . . . the Agreement." During the probationary period, "the seniority provisions of [the collective bargaining agreement] do not apply to flight attendants unless retained in the service of the Company after the probationary period," and "[t]he service of flight attendants may be terminated at any time during the probationary period

> without a hearing." However, the Letter of Agreement excused the incoming flight attendants from having to undergo a probationary period, and gave them other unique employment benefits because of the circumstances under which they were hired. Thus, it seems clear that the incoming flight attendants were not "newly employed flight attendants" as defined in the collective bargaining agreement and were constrained to pay the AFA dues immediately upon commencing employment.

(A12). We repeat: whatever emanations this paragraph may or may not give as to how the Court of Appeals would have decided the claim of violation of RLA § 2, Eleventh on the merits, if it had decided that claim on the merits, it didn't decide that claim on the merits, and this case does not, therefore, present that question to this Court on this petition. Sup. Ct. R. 15.1.

REASONS FOR DENYING THE WRIT

There is no conflict, as petitioners assert (Pet. Point III pp. 9-11), between the holding of the Court of Appeals that the claim of violation of RLA § 2, Eleventh is time-barred, and decisions of this Court and of "other circuits," and petitioners do not even take the trouble to argue their naked assertion that the holding of the Court of Appeals that the claim of violation of RLA § 2, Fourth is time-barred, presents such a conflict.

I

PETITIONERS SHOW NO CONFLICT WITH THE COURT OF APPEALS' HOLDING THAT THE CLAIM OF VIOLATION BY UNITED AND AFA OF RLA § 2, ELEVENTH IS TIME-BARRED

Petitioners appear to argue, in relation to the claim of violation of RLA § 2, Eleventh, that the decision of the Court of Appeals in this case -- that the six-month statute of limitations for suing on the allegedly violative union-security agreement and its enforcement in this case ran from no later than "the date on which appellants were required to become AFA members, February 11, 1986, and the date on which the Letter of Agreement was ratified, March 14, 1986" (A10), whereas petitioners did not make the claim until 1988 (JA 1204-5) -- conflicts (A) with a Ninth Circuit decision and two Second [sic] Circuits decisions, respectively, "[finding] violations of union security clause provisions to be continuing violations until terminated" (Pet. 9), and (B) with this Court's decision in Felter v. Southern Pacific Co., 359 U.S. 326, 79 S.Ct. 847 (1959), requiring, according to petitioners, that "until such time as a valid agreement and assignment is executed in compliance with

RLA Section 152 Eleventh" (Pet. 10), the statute of limitations for suing on the union-security agreement in this case "is tolled" (Pet. 10).

The cited Ninth and Second Circuit decisions do not conflict with the holding of the Court of Appeals. In NLRB v. Campbell Soup Co., 378 F.2d 259 (9th Cir. 1967), cert. den. 389 U.S. 900, 88 S.Ct. 220 (1967), the Ninth Circuit enforced an NLRB order directing both (1) an employer who had required newly hired employees to join the union immediately, and had deducted union dues and initiation fees from the employees' pay, during their first 30 days of employment, and forwarded them to the union, and (2) the union, jointly and severally,

> "to reimburse all employees hired within six months prior to the time the charge was filed in this case for their first month's dues, and to reimburse those employees who, during the same period, paid initiation fees but worked less than thirty days for the initiation fees so deducted."

(378 F.2d at 260) (emphasis added). This order, if issued in this case, would not require United or AFA to pay a penny, since petitioners and the class they represent were all hired nearly 2-1/2 years prior to petitioners' making of the charge of violation of RLA § 2, Eleventh, and no dues deducted during their first 60 days of employment were deducted during the six months prior to the making of the charge. How Campbell Soup comforts petitioners is a mystery. It is implicit authority for the Court of Appeals decision in the case at bar that petitioners' claim of violation of RLA § 2, Eleventh was time-barred because not made within six

months of the execution/ratification or enforcement of the allegedly violative union-security agreement.

In NLRB v. Sightseeing Guides and Lecturers Union, Local 20076 of Greater N.Y., 310 F.2d 40 (2d Cir. 1962), and NLRB v. Gottfried Baking Co., 210 F.2d 772 (2d Cir. 1954), the Second Circuit enforced NLRB orders directing a union which had caused an employer to discharge (Sightseeing) or to refuse to hire (Gottfried) an employee who refused to join the union during his first 30 days of employment, and (in Gottfried only) the employer, to make the employee whole for any loss of pay suffered, and to cease and desist from maintaining and enforcing a contract clause illegally conditioning employment upon membership in the union. It is true but irrelevant that in both cases the charge was filed more than six months after execution of the agreement containing the illegal union-security clause. The point is that in both cases there were union-security violations -- discriminatory action causing loss of pay by an individual, and maintaining of an illegal clause -- during the six months preceding the filing of the charge. By contrast, there were no violations during the corresponding six-months limitations period in the case at bar. The violations, if they were violations, which United and AFA disputed to the hilt and which the Court of Appeals never decided, had all taken place in 1986, two-plus years before the charges were made in 1988 (JA 1204-5).

Nor does Felter conflict with the decision of the Court of Appeals. Felter was an action, brought by an employee 10 days (359 U.S. at 339, 79 S.Ct. at 856) (dissenting opinion) after his union declined to honor his written revocation of a previous check-off authorization because he had not used the revocation form required by the collective bargaining agreement, to invalidate that

requirement as violative of the proviso of RLA § 2, Eleventh (b):

> "that no such agreement [permitting a carrier and a labor organization to make a dues check-off agreement] shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization . . . which shall be revocable in writing after the expiration of one year"

(emphasis added). This Court held the contractual requirement to be violative of the § 2, Eleventh (b) proviso. Felter presented no statute of limitations question, and no such question was addressed or decided in Felter. Yet petitioners argue that Felter "tolls" the statute of limitations in this case "until such time as a valid agreement and assignment is executed in compliance with RLA Section 152 Eleventh" (Pet. 10). That cannot be, else the statute of limitations would be tolled forever; in any event, no such notion is found in Felter. Felter could fairly be argued to stand for the proposition that, in regard to a union-security provision argued to be invalid on it face, as in the case at bar, the statute of limitations runs not only from the date of execution (or ratification) of the agreement but from its actual enforcement as to a particular individual as well. The Court was so to state in Local Lodge No. 1424, IAM v. NLRB, 362 U.S. 411, 423, 80 S.Ct. 822, 830 (1960). That proposition, of course, would not aid petitioners, since they failed to sue until 1988 (JA 1204-5) over either the execution/ratification in 1986, or the enforcement, also in 1986, of the agreement requiring them and their class to pay AFA dues during their first 60 days of employment which started February 11, 1986.

There is no circuit or other conflict, such as petitioners assert, justifying review.

II

PETITIONERS MAKE NO ARGUMENT FOR REVIEW OF THE COURT OF APPEALS' HOLDING THAT THE CLAIM OF VIOLATION BY UNITED OF RLA § 2, FOURTH IS TIME-BARRED

Petitioners, though they announce in their Question Presented 3 (Pet. i) and in their point heading III (Pet. 9) that they wish to challenge the holding of the Court of Appeals that their claim of violation by United of RLA § 2, Fourth was time-barred, make no argument for the point. Perhaps they forgot. No sensible argument could have been made: petitioners did not make their claim of violation by United of RLA § 2, Fourth until July, 1988 (JA 1205), whereas United had made the payments in question to the two arbitration bank accounts in March, 1987, some 16 months earlier, and had done nothing in the premises during the six months prior to July, 1988.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: September 25, 1991

Respectfully submitted,

Eric Rosenfeld
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UNITED AIR LINES, INC.
and STEPHEN WOLF, Its
President